

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

MISSOURI ROUNTABLE FOR LIFE,)	
TODD S. JONES, and)	
FREDERIC N. SAUER,)	
)	
Plaintiffs,)	
)	
v.)	Cause No. 08AC-CC00357
)	
ROBIN CARNAHAN, in her official capacity)	Division I
as Missouri Secretary of State,)	
)	
and)	
)	
SUSAN MONTEE, in her official capacity)	
as Missouri State Auditor,)	
)	
and)	
)	
JEREMIAH W. (JAY) NIXON, in his official)	
capacity as Missouri Attorney General,)	
)	
Defendants.))	

**SUGGESTIONS IN OPPOSITION OF DEFENANDTS’ MOTION
TO DISMISS**

Plaintiffs respond to Defendants’ Motion to Dismiss and state as follows:

I. Counts I, II, and III are not moot because election issues represent a particular brand of cases in which unsettled legal issues of public interest and importance and of a recurring nature are presented that will escape review unless the Court exercises its discretionary jurisdiction.

The Court has the authority to hear cases which are otherwise moot so long as they present: 1) an unsettled legal issues of public interest and importance and 2) an issue of a recurring nature that will escape review unless the Court exercises its discretionary jurisdiction.

Citizens for Safe Waste Management v. St. Louis County Air Pollution Control Appeal Board, 896 S.W.2d 643, 645 (Mo. App. W.D. 1995).

Missouri’s exception to the mootness doctrine is similar to the federal exception to the mootness doctrine that an issue be “capable of repetition yet evading review.” *See Federal*

Election Commission v. Wisconsin Right to Life, Inc., 127 S.Ct. 2652, 2662 (2007). The Missouri exception, however, adds the requirement that the mooted issue must be an unsettled legal issue of public interest and importance. At issue in this case is the fiduciary duties owed by state officials to Missouri citizens who seek to amend the Missouri constitution by a ballot initiative. This issue is at the heart of public interest and importance because the ballot initiative is the way Missouri citizens can band together and directly change their government's fundamental legal document. Misconduct and bias of state officials who are supposed to be impartial destroys this public right of self-determination.

Moreover, election issues are by nature issues of a recurring nature which could escape review. Federal case law is illustrative in this matter as the second prong of the Missouri exception is very similar to the federal exception. The Supreme Court has repeatedly held that election issues are excepted from the mootness doctrine. *See, e.g., Wisconsin Right to Life*, 127 S.Ct. at 2663 (finding that election cases fit comfortably within the established exception to the mootness doctrine). The Supreme Court found that if it were to hold an election issue to be moot, “[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time restraints.” *Norman v. Reed*, 502 U.S. 279, 288 (1992). Moreover, the exception to the mootness doctrine is applicable to “as applied” constitutional challenges because adjudication of the issue “will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.” *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974).

The Missouri and federal exceptions to the mootness doctrine are similar enough that, while not dispositive, the reasoning of the cases mentioned above still applies. Elections are by nature repetitive so that an issue which is not decided by the court in one election cycle will

likely come up again in the next. Should the plaintiffs' case be dismissed for mootness, it is very likely that the plaintiffs will seek to amend the constitution by ballot initiative in the next election cycle. The defendants' would then likely summarize the plaintiffs' proposed initiative in a way which is biased and unfair. There is no reason for history not to repeat itself. Furthermore, elections are by nature temporal matters, which usually conclude before a case can be fully adjudicated in the courts. Should the plaintiffs' case be dismissed for mootness and history subsequently repeats itself, the plaintiffs' case will once again likely be dismissed for mootness at some time before it can be fully heard. Election issues are of a recurring nature which continually escape review unless the Court exercises its discretionary jurisdiction. The plaintiffs should be allowed to adjudicate their case now, so that future attempts to amend the constitution by ballot initiative will be simplified and there will be no further need for litigation on this issue.

II. The Defendants' Motion to Dismiss is incorrect in claiming the plaintiffs have failed to state a claim on which relief may be granted with regards to Counts IV, V, and VI.

- A. Counts V and VI specifically state which sections of the Missouri and Federal Constitutions have been violated by the defendants and show factual support for each violation.

In order to successfully state a claim of a constitutional violation on which relief may be granted, the plaintiffs need to specifically state which sections of the constitution have been violated and identify the facts which provide a basis for the violation. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. 2004). A simple reading of the plaintiffs' petition shows that the petition is indeed more than mere "conclusory allegations that the summary statement, fiscal note summary, and fiscal note frustrated and placed burdens on Plaintiffs' communication as to the proposed amendment." Motion to Dismiss, 7.

1. Factual Basis for Plaintiffs' Claims

When considering a motion to dismiss a petition before discovery is allowed to begin, the court must “allow[] pleadings their broadest intendment, treat[] all facts alleged as true, construe[] all allegations favorably to plaintiff, and determine[] whether averments invoke principles of substantive law.” *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. 1997).

The plaintiffs' Petition alleged that plaintiff Todd Jones submitted a sample petition page for an amendment to the Missouri Constitution (hereinafter “the sample petition”) to the Missouri Secretary of State (hereinafter “the Secretary”). Pet., pg. 4, ¶ 10. The sample petition contained the proposed text of the amendment. *Id.* Both the sample petition and the language of the proposed amendment were included in the plaintiffs' petition. Pet., pg. 4, ¶ 11. In addition to submitting the sample petition, Jones and plaintiff Missouri Roundtable for Life (hereinafter “MRFL”) submitted a proposed ballot title to the Secretary. Pet., pg. 5, ¶ 12. The Secretary sent the sample petition to the Missouri Attorney General (hereinafter “AG”), who reviewed it and approved it. Pet., pg. 5, ¶ 13. The proposed constitutional amendment has 58 words, Pet., pg. 4, ¶ 11, and the proposed ballot title, which is nearly identical to the proposed amendment, has 72 words, Pet., pg. 5, ¶ 16

The Secretary summarized the 58 word proposed constitutional amendment and the nearly identical 72 word proposed ballot title with 41 words. Pet., pg. 6 ¶ 17. This “summary” was transmitted to the AG for review, Pet., pg. 6, ¶ 19, who subsequently approved it, Pet., pg. 6, ¶ 20. The full text of the summary is included in the plaintiffs' petition on page 6, ¶ 20. Further discovery is needed to determine who actually drafted the 41 word summary. Pet., pg. 6, ¶ 18

The Secretary forwarded the sample petition to the Missouri State Auditor (hereinafter “the Auditor”) and requested a fiscal note and fiscal note summary. Pet., pg. 6, ¶ 22. The Auditor accepted comments to the proposed amendment which did not comply with RSMo. § 116.175. Pet., pg. 7, ¶ 25. The plaintiffs’ petition goes on to list some of these noncompliant comments. Pet., pg. 7-9, ¶ 26. The AG approved the fiscal note and fiscal note summary. Pet., pg. 9, ¶ 27.

Not only does the plaintiffs’ petition set the factual backdrop for the constitutional violations and each defendant’s conduct with regard to the violations, but the plaintiffs’ petition also goes into extensive detail about how the Secretary’s 41 word summary statement unfairly characterizes the proposed amendment and evinces a bias against the amendment. Pet., pg. 10-13, ¶34. The Auditor’s fiscal note summary is similarly shown to be unfair and biased. Pet., pg. 15, ¶43. Finally, the plaintiffs’ petition alleges that the AG failed to determine whether the Auditor complied with statutory standards when writing the fiscal note and fiscal note summary. Pet., pg. 18, ¶56.

The assertion in the Defendant’s Motion to Dismiss that “[p]laintiffs do not allege facts to support their claims of a constitutional violation,” Motion to Dismiss, 8, suggests an unfamiliarity with the majority of plaintiffs’ petition.

2. Article I, Section 2 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution

Article I, Section 2 of the Missouri Constitution states, *inter alia*, “all persons are created equal and are entitled to equal rights and opportunity under the law.” If the Secretary, Auditor, or AG expresses any bias concerning the drafting, reviewing, or approval of the summary statement, fiscal note summary, and fiscal note, then they have violated Article I, Section 2. The class of persons who disagrees with the defendants’ viewpoints concerning the proposed

constitutional amendment would not be given the same opportunity to amend the constitution as the class of persons who agree with the defendants would be given to defeat any attempts to seek to amend in a name/word by these state officials.

The defendants' reliance on *Wellwood v. Johnson*, 172 F.3d 1007 (8th Cir. 1999), is misplaced. At issue in *Wellwood* was whether placing additional burdens on a particular issue, as opposed to a position on that issue, is a violation of the right to equal protection. In this case, Arkansas law placed additional restrictions on ballot initiatives that sought to change a county from being "wet" (allowing alcohol sales) to being "dry" (forbidding alcohol sales) and vice versa. *Id.*, 172 F.3d at 1008. The statute at issue did not favor allowing or forbidding alcohol sales, but merely sought to make it more difficult for counties to change their stance on alcohol sales. The *Wellwood* court explicitly distinguished this case from cases, such as the one at hand, where a state seeks to discriminate against a particular position on an issue. *Id.*, 172 F.3d at 1010.

Defendants in their Motion to Dismiss rely heavily on *Wellwood* and claim that plaintiffs are not an "independently identifiable group." In fact the court indicated that the plaintiff, who was an individual, would have prevailed if he could have provided the court with an independently identifiable group that favors or disfavors the issue. In the case at bar there obviously are independently identifiable groups that favor or disfavor embryonic stem cell research and cloning within the state of Missouri as the last general election and current political discourse demonstrate. The plaintiff Missouri Roundtable for Life is itself or at least a part of such a group.

The Fourteenth Amendment, and similarly Article I, Section 2 of the Missouri Constitution, is violated by an uneven application of state law if that uneven application is the

result of discrimination. *Moore v. City of Pacific*, 534 S.W.2d 486, 500 (Mo. 1976). When deciding whether the right to equal protection has been violated, the court must look at the totality of the circumstances. “Only by sifting facts and weighing circumstances can we determine whether the reach of the Fourteenth Amendment extends to a particular case.” *Evans v. Newton*, 382 U.S. 296, 299-300 (1966) (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 230 (1964).

In this case, the plaintiffs allege that the Secretary of State summarized the proposed constitutional amendment with language which was intentionally argumentative and likely to create prejudice against the proposed measure in violation of RSMo. § 116.334. Pet., pg. 10-13, ¶¶ 33-34. This was done in an attempt to cause the proposed amendment to fail, which discriminates against the supporters of the proposed amendment. Pet., pg. 10, ¶ 32; pg. 22, ¶ 67.

The plaintiffs further allege that the Auditor improperly accepted and considered comments which did not comport with the statutory requirements of RSMo. § 116.175 or RSMo. § 23.140. Pet., pg. 7-9, ¶¶ 25-26; pg. 15-16, ¶¶ 43-45. This was similar done as a result of discrimination. Pet., pg. 16, ¶ 46; pg. 22, ¶ 67.

Finally, the plaintiffs allege that the Attorney General failed to determine whether the Auditor complied with RSMo. § 116.175 as the Attorney General is required to under that same statute. Pet., pg. 18, ¶ 56. This failure is the result of discrimination. Pet., pg. 22, ¶ 67.

3. Article I, Section 3, and Article III, Section 49 of the Missouri Constitution

Article I, Section 3 grants the people of Missouri the right to change their constitution. Similarly, Article III, Section 49 states, “[t]he people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly” Together, these sections protect the right of Missourians to seek to alter their constitution independent of the general assembly by a ballot initiative. This right, however, is undermined when state officials, who are supposed to impartially oversee the initiative process, take advantage of their position to summarize a proposed amendment in a discriminatory and misleading fashion.

The Defendants’ Motion to Dismiss attempts to claim that the plaintiffs have not stated a claim on which relief may be granted, with reference to Article I, Section 3, and Article III, Section 49 of the Missouri Constitution, because Article XII, Section 2(b) contains the words “as provided by law.” For this reason, any claim the plaintiffs may have concerning the ballot initiative must be brought under the statutes which were violated. Motion to Dismiss, 10-11.

The defendants’ argument fails for two reasons. First, the plaintiffs do not claim that Article XII, Section 2(b) was violated in any way. Rather Article I, Section 3, and Article III, Section 49, were violated and so the texts of those sections are controlling. Article XII, Section 2(b) is therefore irrelevant. Secondly, the defendants’ reliance on *Wann v. Reorganized School Dist. No. 6 of St. Francois County*, 293 S.W.2d 408 (Mo. 1956), is misplaced. *Wann* does not hold, as defendants claim, that if a constitutional section contains the words “as provided by law,” then the section only lays down a general principal for the legislature to expand on so that a constitutional violation can only be brought by challenging the corresponding statutes. Rather, the entire constitutional section must be examined as a whole to determine whether that section

was intended to only lay down a general principal. *Wann*, 293 S.W.2d at 411 (finding that Article VI, Section 26(g), which states “All elections under this article may be contested as provided by law,” is a general principal for the legislature to flush out, when considered in its entirety).

The defendants have failed to carry the burden on their motion to dismiss. To the contrary, plaintiffs have pled all necessary elements of their claims that defendants have violated various provisions of the constitution.

4. Article I, Section 8 of the Missouri Constitution and the First Amendment to the United States Constitution

Article I, Section 8 of the Missouri Constitution and the First Amendment to the United States Constitution grant the people of Missouri the right to free speech. While ballots are not primarily fora for political expression, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997), free speech should not be unconstitutionally censored to the extent speech is allowed. Plaintiffs take no issue with the state’s right to summarize a ballot initiative, so long as that summary is drafted in a fair and unbiased manner. However, if the summary slanted so as to favor one side of the issue, then the right to free speech has been violated.

Defendants also contend that state actions which merely make speech less likely to succeed, instead of reducing speech, do not violate the First Amendment. Motion to Dismiss, 14-15. This assertion is not in question. Plaintiffs’ complaints, however, are not that the defendants merely made it difficult for the proposed amendment to pass, but that the defendants intentionally mischaracterized the proposed amendment so that the proposed amendment would be difficult to pass. Defendants thus have dictated the terms of speech - in biased and prejudicial terms – on plaintiffs’ exercise of their right to seek to amend the constitution.

Defendants rely on *Dobrovolny* for their assertion that just because defendants make the process more difficult it does not mean that plaintiffs First Amendment Rights have been violated. This is an error. In *Dobrovolny* the court stated “[T]he difficulty of the process alone is insufficient to implicate the First Amendment, so long as the communication of ideas associated with the circulation of petitions is not affected” Id at 1113. In the case at hand the “communication of ideas” has clearly been “affected” when the defendants hand down ballot language and fiscal notes that are biased, which then force the plaintiff to communicate through the circulation of petitions something very different from what they had proposed.

For instance, if a plaintiff had proposed a Constitutional Amendment saying that all Missouri residence must drive red cars and the defendants proposed ballot language and fiscal notes stating that all residents must drive blue cars, then clearly plaintiffs’ ability to communicate their idea of driving red cars has been “affected.” Similarly plaintiff would be forced to circulate a petition that did not fairly represent or communicate their ideas.

Count IV does state a claim upon which relief may be granted.

The Defendants’ Motion to Dismiss has not shown that the plaintiffs failed to state a claim on which relief may be granted. For this reason, a conspiracy claim is not barred under *Williams v. Mercantile Bank of St. Louis*, 845 S.W.2d 78 (Mo. App. 1993).

Wherefore, Plaintiffs request this court deny Defendants Motion to Dismiss.

Respectfully submitted,

LAW OFFICES OF
MATTHEW H. HEARNE

Matt H. Hearne #43482
7711 Bonhomme Ave.
Suite 330
St. Louis, Missouri 63105
Phone: (314) 863-0200
Fax: (314) 863-4247

ATTORNEYS FOR PLAINTIFFS

Certificate of Service

Copy of the foregoing was mailed this 18 day of July, 2008,
postage prepaid, to:

Heidi Doerhoff Vollett

Jeannie Desir

Assistant Attorneys General

P. O. Box 899

Jefferson City, MO 65102
